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No. 91-607

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PAUL F. MCDONALD,

Petitioner,

v.

PIEDMONT AVIATION, INC.

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did a unanimous panel of the United States Court of Appeals for the Second Circuit properly reverse a jury's unprecedented award of lifetime wages and employee benefits totalling 42 years under Section 43(d) of the Airline Deregulation Act of 1978 and limit such damages to 72 months of back pay where the plain language, structure and purpose of the statute establish that Congress created a temporary, transitional assistance program?

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Respondent Piedmont Aviation, Inc. ("Piedmont")[1] respectfully submits this brief in support of its request that the Court deny the petition for a writ of certiorari to

[1] Pursuant to Supreme Court Rule 29.1, Respondent certifies that as of August 5, 1989, Piedmont Aviation, Inc. was merged into USAir, Inc., a wholly owned subsidiary of USAir Group, Inc.

review the unanimous judgment of the United States Court of Appeals for the Second Circuit in *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir. 1991).

STATEMENT OF THE CASE

McDonald commenced this action against Piedmont in the United States District Court for the Southern District of New York in late 1984, alleging that he had been denied a "first right of hire" as a "protected employee" under Section 43(d) of the Employee Protection Program (the "EPP") of the Airline Deregulation Act of 1978 (the "ADA"), 49 U.S.C.A. § 1552 *et seq.* (West Supp. 1991). McDonald claimed that when he applied to Piedmont for employment as a pilot in November 1981, Piedmont, a "covered carrier" subject to the EPP's first-hire duty, failed to hire him for positions that were filled by non-protected applicants. The complaint sought a judgment directing Piedmont to hire McDonald as a pilot and granting him seniority as of November 1, 1981, as well as back pay and other damages.

A jury found Piedmont liable for failing to hire McDonald and awarded him $2,226,920.00 in wages and employee benefits for a 42-year period, including back pay for more than 8 years, front pay for 15 years and pension benefits for an additional 19 years. This award of lifetime wages and benefits for a 42-year period was unprecedented under federal employment law.

Piedmont appealed from the judgment entered after the jury's verdict. The Court of Appeals for the Second Circuit affirmed the jury's determination of liability but reversed the award of damages. *McDonald v. Piedmont Aviation, Inc.*, 930 F.2d 220 (2d Cir. 1991). Specifically, the unanimous panel held that the district court erred in permitting the jury to award compensatory damages for the projected duration of McDonald's career. The Court of Appeals found, consistent with the EPP's statutory language and its purpose as a temporary transitional assistance program, that damages under Section 43(d) are limited to a maximum of 72 months.

REASONS FOR DENYING THE WRIT

Petitioner has cited no "special and important reasons" warranting a grant of a writ of certiorari in this case. Sup. Ct. R. 10.1. The EPP was enacted as part of the ADA to provide temporary transitional assistance to workers in the airline industry displaced by deregulation during a 10-year period ending in 1988. Section 43(d) gives "protected employees" a hiring preference with "covered carriers." Several lower courts have held that Section 43(d) creates an implied right of action. The Second Circuit agreed and fashioned a remedy consistent with the statutory scheme of providing temporary transitional assistance by limiting damages to 72 months.

Contrary to Petitioner's assertions, the decision below is consistent with this Court's decision in *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), which held only that the EPP was severable from and therefore survived an unconstitutional legislative veto provision. Moreover, there is no conflict between the Second Circuit's decision below and the decision of the Court of Appeals for the D.C. Circuit in *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991), which did not address the issue of the amount or duration of damages at all, but held only that a protected employee

did not lose his hiring preference by taking a job with a non-covered airline. Finally, resolution of the question presented by Petitioner will not dispose of this case. Piedmont raised several additional meritorious arguments that would have resulted in reversal of the district court's judgment had the court below found it necessary to reach them.

This case raises no issues of national importance justifying review by this Court. Eligibility under the EPP's temporary assistance provisions expired three years ago, and there have been few cases arising under this statute.[2] Accordingly, there is no compelling reason to review the Second Circuit's decision.

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[2] Petitioner's bald assertion that he is one of "thousands of protected employees whose Section 43 rights were flagrantly dishonored" finds no support in the record. Petition at 5. In fact, counsel for Piedmont is aware of only a few pending cases arising under Section 43(d) of the EPP. *See Gonzalez v. Aloha Airlines, Inc.*, 940 F.2d 1312 (9th Cir. 1991); *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991); *Long v. Trans World Airlines, Inc.*, 913 F.2d 1262 (7th Cir. 1990). Each of these cases addressed issues entirely different from the issue decided by the Second Circuit.

I. The Second Circuit's Decision Is Consistent With The Language, Structure And Purpose Of The Employee Protection Program And Does Not Raise An Issue Of National Importance

The decision below was correctly decided, is consistent with congressional intent expressed in the language and structure of the EPP as well as its legislative history, and, because it relates to a temporary transitional program that has now expired, does not raise any issue of national importance upon which the Court's guidance is needed.

Because Congress failed to provide a mechanism for enforcing the EPP, several lower federal courts have implied a right of action under Section 43(d). In determining what relief may be available under the implied private right of action, the court's "'function is to decide what remedies are appropriate in the light of the statutory language and purpose and of the traditional modes by which courts compel performance of legal obligations.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 376 (1982) *(quoting Montana-*

Dakota Util. Co. v. Northwestern Publ. Serv. Co., 341 U.S. 246, 261-62 (1951) (Frankfurter, J., dissenting)).[3]

The Second Circuit properly construed the statutory language and structure of Section 43 and concluded that the temporary and transitional nature of the EPP required that damages under an implied right of action be limited to 72 months.

Section 43 consists of two interrelated components. *Alaska Airlines*, 480 U.S. at 694 n.18. The first provides for monthly federal assistance payments while a displaced airline employee is looking for employment. Although the first component has never been implemented,[4] the terms

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[3] None of the recent Supreme Court cases cited by Petitioner in support of his argument that the Second Circuit incorrectly construed the EPP dealt with the fashioning of a remedy for an *implied* right of action. *See* Petition at 11-13. In each of these cases, the Supreme Court was construing express provisions of a statute. Here, because Congress failed to provide any remedy under the EPP, the Second Circuit properly looked at the plain language, structure and purpose of the statute as a temporary transitional assistance program.

[4] The Secretary of Labor never adopted rules to implement the financial assistance program, and Congress has not appropriated funds for such payments. However, the ultimate failure of Congress to fund the monthly assistance program has no bearing upon the intent of Congress at the time the program was enacted. *See United States v. Price*, 361 U.S. 304, 310-12 (1960).

of this assistance program reflect "close to the full cost" of the protection that Congress intended to provide "protected employee[s]" who lost their jobs as a result of a "qualifying dislocation." *See* 49 U.S.C.A. § 1552(a), (h) (West Supp. 1991); *Alaska Airlines,* 480 U.S. at 693 *(quoting* S. Rep. No. 95-631, p. 114 (1978)). The monthly federal assistance payments were to be a percentage of the employee's last salary as determined by the Secretary of Labor (less any unemployment compensation received), 49 U.S.C.A. § 1552(b)(1) (West Supp. 1991), and were to continue until either the protected employee obtained "other employment" or the passage of 72 months, whichever occurred first. *Id.* § 1552(e)(1).

The hiring preference under Section 43(d) was a second, interrelated component. *Alaska Airlines,* 480 U.S. at 694 n.18. The hiring preference only applies to protected employees who were terminated (other than for cause) "prior to the last day of the 10-year period beginning on October 24, 1978." 49 U.S.C.A. § 1552(d) (West Supp. 1991). All of the obligations under Section 43 -- financial assistance *and* hiring preference -- "terminate on the last day the Secretary [of Labor] is required to make a payment under this section." 49 U.S.C.A. § 1552(j) (West Supp. 1991). Together these

two provisions manifest the temporary and transitional nature of the statute. Accordingly, the Second Circuit correctly concluded that damages should be limited to 72 months.

The legislative history of the ADA supports this conclusion. Congress recognized in 1978 that deregulation might cause some short-term loss of employment. To cushion the impact of deregulation on employees, Congress concluded that "a temporary transitional assistance program" was appropriate. S. Rep. No. 631, 95th Cong., 2d Sess. 115 (1978) (hereinafter cited as "Senate Report"). Section 43, with its financial assistance and hiring preference components, is that temporary, transitional program.

The cost of Section 43 was to be borne principally by the public. The Senate Report states that

> the public interest will be best served by a more competitive system in which airline management has greater discretion with respect to routes and prices. Because it is the public who will benefit from the regulatory reform provided for in this bill, the public should be willing to assume reasonably close to the full cost of such reform, including the cost of transition for any dislocated employees.

Senate Report at 114. *See Alaska Airlines,* 480 U.S. at 692-93. The hiring preference in Section 43(d) would make new jobs available to protected employees, thereby "decreas[ing] the cash payments required under the [federal assistance] program." Senate Report at 116. Together the financial assistance provisions and hiring preference were "intended to place on the *employees* the reasonable requirement of seeking and accepting available employment while still providing assistance where necessary." *Id.* at 116 (emphasis added).

In structuring the "temporary transitional assistance" afforded to employees under Section 43, Congress relied heavily on other forms of labor protection imposed on the airline and railroad industries -- none of which extends protection to employees beyond 72 months. In airline merger cases, the Civil Aeronautics Board imposed labor protective conditions including up to 60 months of supplemental compensation for those airline employees who lost their jobs. *See Alaska Airlines,* 480 U.S. at 692 n.16 *(citing United-Capital Merger Case,* 33 C.A.B. 307, 342-47 (1961); *Allegheny-Mohawk Merger Case,* 59 C.A.B. 22, 31-40 (1972)). Similarly, Section 11347 of the Interstate Commerce Act contains employee protection for railroad employees to cushion any short-term loss of

jobs in connection with a railroad merger, consolidation or coordination -- typically 72 months of supplemental compensation based on a percentage of a railroad employee's most recent salary. *See New York Dock Ry. v. United States,* 609 F.2d 83, 87, 91 (2d Cir. 1979); 49 U.S.C.A. § 11347 (West Supp. 1991) *(amending* 49 U.S.C.A. § 5(2)(f)). Because the EPP has its origin in labor protective provisions imposed on the airline and railroad industries, the remedy available under Section 43 should not exceed the limited relief afforded to railroad and airline employees under similar circumstances.

The temporary, transitional nature of Section 43 is easily distinguished from federal statutes designed to eradicate the effects of discrimination in society, like Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e *et seq.,* or the Age Discrimination in Employment Act of 1978, 29 U.S.C.A. § 621 *et seq.,* where Congress intended to provide "make whole" relief. *Cf. Albemarle Paper Co. v. Moody,* 422 U.S. 405, 419-21 (1975) ("The 'make whole' purpose of Title VII is made evident by the legislative history."). Section 43 does not guarantee a protected employee a particular job or "career" at a covered carrier, nor does it guarantee higher compensation than he earned in his previous job. It certainly does not envision a

lifetime annuity to be awarded by a jury or the "comfortable career" that Petitioner seeks. Petition at 22.[5]

The district court's award of lifetime damages was inconsistent with Congress' intent to establish a "temporary transitional assistance program," Senate Report at 115, and resulted in a windfall recovery for *McDonald*. The Second Circuit properly recognized the district court's error and limited the damages award to the 72-month period for financial assistance specified by Congress.

II. The Second Circuit's Decision Is Consistent With This Court's Decision In *Alaska Airlines* Which Recognized That The Financial Assistance Provisions And The First-Hire Preference Were Related

In *Alaska Airlines*, this Court held only that the unconstitutional legislative veto provision contained in the

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[5] The Fifth Circuit's decision in *Hulsey v. USAir, Inc.*, reaffirms that Section 43(d) created only a hiring preference, not an entitlement to a career. 868 F.2d 1423, 1425 (5th Cir.), *cert. denied*, 493 U.S. 892 (1989) (Section 43(d) was not violated when a protected employee given a hiring preference was terminated by the covered air carrier during his probationary period).

EPP was severable from the remainder of the EPP provisions. That case did not remotely involve the issue of damages recoverable by a protected employee in an implied private action under the EPP.

Petitioner's contention that the Second Circuit's interpretation of the EPP is in conflict with footnote 18 of *Alaska Airlines* is without merit. In footnote 18, this Court addressed arguments relating to the severability of the legislative veto provision. The petitioners in that case argued that since the legislative veto was crucial to the passage of the financial assistance provisions, it must also have been crucial to the first-hire provisions, the two being "tightly linked." Id. at 694 n.18. Although the Court rejected the argument in the context of the legislative veto, it confirmed that in other respects the first-hire provisions and financial assistance provisions are connected. "The two components *were related* in that the right of first-hire was predicted to 'decrease the cash payments required under the program,' S. Rep. No. 95-631, p. 116, and the Act conditions the receipt of monthly assistance payments on cooperation with the Secretary [of

Labor] in seeking other employment, § 43(d)(2)." 480 U.S. at 694 n.18 (emphasis added).[6]

Similarly, the Second Circuit recognized that the provisions of Section 43 were interrelated. In implying a private remedy under Section 43(d), the court was required to accomplish the legislative intent of providing temporary and transitional assistance and encouraging protected employees to seek work. Accordingly, the Second Circuit limited damages to 72 months, the maximum period of time expressly provided by Congress for financial assistance payments under Section 43.

III. There Is No Conflict With The United States Court Of Appeals For The District Of Columbia Circuit Or The Department of Labor

Petitioner's attempt to invent a circuit conflict is equally unavailing. In *Crocker v. Piedmont Aviation, Inc.*, 933 F.2d 1024 (D.C. Cir. 1991), the Court of Appeals for the D.C. Circuit was faced *solely* with the issue of *when* a

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[6] The Court noted that the legislative veto was not crucial to the first-hire provisions, even though related to the financial provisions, since "the first-hire program is capable of serving as the sole means of employee protection." *Id.*

protected employee's right of first-hire under Section 43(d) is extinguished. The issue presented in *Crocker* was very fact specific and bears no resemblance to the issue addressed by the Second Circuit. The question of damages for breach of Section 43(d) was not before the *Crocker* court and thus *Crocker* is inapplicable here.

In *Crocker,* the district court granted judgment for Piedmont on the ground that Crocker ceased to be a covered employee entitled to the first-hire preference when he accepted a "reasonably comparable position" with Coral Air, a non-covered carrier with no duty under Section 43(d). *Crocker v. Piedmont Aviation, Inc.,* 741 F. Supp. 241, 244 (D.D.C. 1989). The Court of Appeals reversed, finding that obtaining "reasonably comparable employment" should not extinguish the first-hire right. *Crocker,* 933 F.2d at 1026. Rather, a protected employee's first-hire preference is only extinguished through employment with a covered carrier. *Id.* at 1027.

Nothing in *Crocker* conflicts with the Second Circuit's decision here. Contrary to Petitioner's assertions, the Second Circuit did not "heavily rel[y]" on the district court's decision in *Crocker.* Rather, the Second Circuit cites the district court's decision for the irrefutable proposition, supported by this Court's decision in *Alaska*

Airlines and the ADA's legislative history, and not disputed by the District of Columbia Circuit, that "[t]he duty to hire provision was adopted as a supplement for the monthly assistance payments to reduce and [sic] burden on the federal government purse. . . ." *McDonald,* 930 F.2d at 227 *(quoting Crocker v. Piedmont Aviation, Inc.,* No. 86-1673 (RCL), 1990 U.S. Dist. LEXIS 1324 (D.D.C. Feb. 8, 1990)); *see Alaska Airlines,* 480 U.S. at 694 n.18; Senate Report at 116; *Crocker,* 933 F.2d at 1027.

The appellate court in *Crocker* recognized this purpose of the EPP and concluded that extinguishing the first-hire right upon acceptance of employment with a non-covered carrier would frustrate the legislative intent to encourage reemployment of displaced employees. The prospect of losing the first-hire right would discourage such employees from taking interim employment with a non-covered carrier. 933 F.2d at 1024.

The Second Circuit's application of a 72 month limitation on damages is thus wholly consistent with the legislative intent and the *Crocker* decision. By limiting damages, protected employees are encouraged to pursue employment opportunities in the airline industry. This is precisely what Congress intended when it created a temporary transitional program.

Petitioner further contends that the Second Circuit opinion is in conflict with the position of the Department of Labor ("DOL") set forth in its *amicus curiae* brief filed in *Crocker*. The DOL brief relates strictly to *when* the first-hire preference is extinguished. The DOL did not address in any respect the appropriate remedy under the statute. Furthermore, as the agency charged with promulgating regulations under Section 43, including regulations relating to whether an employee is entitled to a hiring preference, the DOL's position was properly considered by the *Crocker* court. Here, however, the question of relief available under an implied right of action is solely within the province of the courts. *See Merrill Lynch*, 456 U.S. at 376-77.

IV. Resolution Of The Question Presented By Petitioner Is Not Necessary Since Additional Grounds Support The Second Circuit's Reversal On Damages

The Second Circuit did not reach several additional arguments raised by Piedmont supporting reversal of the district court's award of damages. The court below could have found that damages should have been limited on any of three additional grounds. First, the district court erred in permitting the *jury* to award front pay. Front pay is an

equitable remedy that is sometimes awarded by a trial judge, not a jury, in employment discrimination cases in lieu of reinstatement to effectuate the remedial purposes of a statute. *See Dominic v. Consolidated Edison Co.*, 822 F.2d 1249, 1257 (2d Cir. 1987) (whether a front pay remedy is available under the ADEA and the amount of front pay to be awarded is to be answered by the court, not the jury). Therefore, if an award of front pay were appropriate under Section 43(d), which it is not, the judge and not the jury should have made that determination.

Second, the district court erred in failing to impose limitations on any front pay award. The Second Circuit, like other courts, has placed strict limitations on front pay awards. Finding such awards susceptible to undue speculation, courts limit future damages to periods lasting only a few months or, at most, a few years and require a sufficient evidentiary basis to support such limited awards. *See, e.g., Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984); *see also Anastasio v. Schering Corp.*, 838 F.2d 701, 709 (3d Cir. 1988).

Third, the district court erred in excluding relevant evidence demonstrating that McDonald had failed to mitigate his damages. Piedmont was not allowed to inquire whether Petitioner had informed other covered

carriers of his right to a hiring preference under Section 43(d) or to offer in evidence Petitioner's applications to other air carriers. Failure to allow this evidence prevented Piedmont from establishing that McDonald failed to make reasonable efforts to find available employment at other covered carriers.

CONCLUSION

The decision of the Second Circuit to limit damages available under Section 43(d) to 72 months was correct, consistent with congressional intent expressed in the language, structure, and legislative history of the statute, and not inconsistent with any decision of this Court or any of the circuits. For all of the foregoing reasons, McDonald's petition for a writ of certiorari should be denied.

Dated: October 23, 1991 Respectfully submitted,

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